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FESTINA LENTE.

It is a common-place saying that we live in a period not only of amazing accomplishment, but of transition that is rapid, colossal, world wide. The changes from the old to the new in the Far East, as well as the near West, are notable, yes wonderful, in international relations, in government, in the conduct of public and also private business, in the economical management of affairs which concern the general welfare as well as those which affect domestic interests. The advance in physics, the study of the laws and purposes of Nature, discoveries and inventions, and novel applications of known forces have altered the conceptions and the habits of millions of mankind.

Majestic floating palaces traverse the oceans under whose waves stretch cables flashing messages from country to country and through the air above the water, the wireless telegraph transmits words of need, of help, of cheer, of warning, of every meaning, from and to those, who are separated by distances of even thousands of miles. Mountains are no longer impassable barriers for their hearts of rock are pierced by steel tracks over which passengers and commodities are propelled with celerity from place to place, from nation to nation. Even the long-considered problem of aerial navigation seems to be nearing practical solution. Chemistry, too, in its sphere of development, has made and is making a progress that appears magical,

transmuting base elements into either ether or fluids more beneficial to mankind than the gold sought by the alchemists of old. The "strange things" are becoming familiar things.

In accord with all the mutations that are actual, visible and tangible, have arisen questions, theories, and speculations in religion, in metaphysics, in regard to the rights of man, as man, in public and private law. Thinking minds are grappling with problems and consciences are quickened. It is an age of unrest, but not of pessimism or gloom.

Changes in the law are considered; the exigencies of modern conditions must be met. The inquiry is ever heard: Can settled principles apply and govern, or must new ones be sought, and if found, prevail? The conservative lawyer, who respects and follows the precedents and decisions of the courts of last resort, is inevitably less conspicuous than the iconoclast whose superior genius breaks into fragments and casts away both the unwritten law and the statutory tablets of the past. Or research may unearth long buried and worthless arguments and they may be scoured and polished or veneered with modern lingo and exhibited as new. Yet in truth, historical study, noble in motive as well as erudite, may and often does ascertain, and publish valuable and long disregarded propositions, which convince the reason and exhibit sound learning, and whose re-adoption results in the attainment of, the one worthy object of legal thought, the administration of justice. Bad law is replaced by good law.

There is, however, a contrary and powerful current in the progress of the law. There are men who have a penchant for writing statutes,—a legion of them. Hence there is an epidemic of code making with no legal anti-toxin in sight. The mind is dazed by the plethora of books, statutes, reports, periodicals and essays with themes and suggestions in number like the sands of the seashore. Everything "goes," from the logic of the theorist to the vagaries of the dilettanti. Sciolist and scientist pass side by side in the madding crowd. The current never ceasing, ever increasing, is sweeping on. The tendency is towards *a priori* reasoning, when law should be a growth, developed by the needs and conditions of those who

are affected by it, not an exact science, uniform and uncompromising, either physical or metaphysical.

The sources of our common law, Anglo Saxon, Norman and Roman, in judicial decisions, in ancient customs, in English and American statutes, in local needs, in the development of communities, in the exigencies of men, are so many and so varied that to trace them in their sources and in their streams has been the study of able and single-minded scholars, historical, legal and philosophical. Is law a deductive science wherein numerous rules are deduced from a few given axioms? Or can it be deemed an inductive science with genus, species and differentia formulated from many illustrations by the inference that what has been observed or established in regard to a part may, on the ground of analogy, be affirmed or received of the whole to which it belongs?

The judgments of human minds and the underlying basic conceptions of men differ. How often do judges of learning, logic and love of justice, lock horns in the determination of propositions of law or in their application to the facts of particular cases. The differences are found, not only in the efforts to solve great problems, but also in less important contentions. As stated in the introduction of Pollock and Maitland's History of the English Common Law,—"The matter of legal science is not an ideal result of ethical and political analysis; it is the actual result of facts of human nature and history."

Separated from all academic discussion and the seclusion of the cloister, are the men of activity in practical occupations. Contracts are made, kept or broken: torts are, or are alleged to be, committed: contentions are many and they are inevitable in the multitude of human transactions; courts must exist; judges must hear arguments; controversies must be determined.

In the report on Civil and Common Law of the Committee on the Judiciary, set out in the appendix of the first volume of California State Reports at page 590, occurs the following statement:

"Such is the wonderful complexity of human affairs,—a complexity which must always increase more and more in proportion to the advance of commerce, of civilization, and of

refinement—that of the immense multitude of questions, which are brought before courts for adjudication, but very few arise under or are dependent upon, or can be controlled by, Constitutions or express statutory laws."

There is an honest belief, cherished by many legal scholars, that the principles of the common law are based upon sound reason and are broad enough, and, so to say, malleable enough, to apply to questions that arise under present conditions. As this article is upon an emergency call, "to be prepared, if possible, in two days," familiar illustrations are recalled and cited in support of the belief just stated.

Of Coggs v. Barnard, Lord Raymond, 909, it is said:

"One of the most celebrated ever decided in Westminster Hall, and justly so, since the elaborate judgment of Lord Holt, contains the first well-ordered exposition of the English law of Bailments."

The decisions of Lord Mansfield, mentioned and commented upon in Campbell's Lives of the Chief Justices, Vol. 3, at page 302, *et seq.*, show that, (though, true it is that some of these have been criticized), his moulding, perhaps making, of commercial law settled general rules with precision and upon sound principles. In the words of his biographer: "He materially improved the jurisprudence of his country."

To illustrate further, reference may be made to a case much discussed by Pennsylvania lawyers, viz., Sanderson v. Coal Co., 86 Pa. 401; 102 Pa. 370; Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, a case upon debatable questions of rights and damages, in which intricate questions were discussed and finally determined, though by a divided court.

One more instance may be given under the present limitations of time and space: Commonwealth v. Shortall, 206 Pa. 165, in which Justice Mitchell defines the qualified martial law, and its effect, which existed where the civil courts and other agencies of the law are open for the ascertainment or vindication of private rights or the other functions of government. These decisions are referred to simply to show the adaptability of the common law. No attempt is herein made to discuss them.

A part of the argument in favor of the common law as made in the report of the California Committee, above alluded to, is worthy of quotation (page 591):

"We know it to be a favorite theme of some men that the entire laws of a community, regulating every variety of business, and defining and providing the penalty for every grade of crime, may be and ought to be, reduced within the compass of a common sized spelling book—so that every man might become his own lawyer and judge—so that the farmer, the artisan, the merchant, with this *vade mecum* in his pocket, at the plough, in the workshop or in the counting-house, might be enabled, at a moment's warning, to open its leaves and point directly to the very page, section, and line, which would elucidate the darkest case, solve the most abstruse legal problem, clearly define his rights, and prescribe the exact remedy for his wrongs. It is scarcely necessary to say that all such notions are but the chimeras of ignorance and folly, or the fancies of a spirit more reprehensible and more to be deprecated than ignorance and folly conjoined. The features and forms of men are no more diverse than their minds—and their business transactions are as ever-varying as their mental and moral characters. One man views the same object, whether physical or moral, or legal, in a different light from another—no two men ever do the same thing in precisely the same way—perhaps no two cases ever arose without a shade of difference between them; and until you can cast the forms and features of all men in the same mould, reduce the operations of their minds to the same uniform level, and endow each individual with the same moral sense and the same intellectual faculties, you may expect nothing less than diversity in their modes of business, in their bargains and sales, their contracts, conveyances and testaments, and their manifold devices for the perpetration of fraud and crime. To undertake by statute or by code, to establish a just and accurate rule for every contingency of human avarice and of human passions, and for all the endless phases of varied life, is to essay a task which never yet was accomplished—a task which, until the Almighty shall change the nature and attributes of man, must forever remain equally impracticable and absurd. In truth, all the provisions of constitutions, and statutes and codes are but pebbles on the sea shore—the vast ocean of legal science lies beyond.——"

Let us briefly consider some further objections to codes. The doctrine of *stare decisis* was commended by Judge Shars-

wood in Schafer v. Farmers and Mechanics Bank, 59 Pa., 144, in these words:

"To overrule these cases and establish any other rule would lead to worse consequences by creating the feeling that the point was still unsettled. The traditional experience of the courts,' as has been said by Lord Eldon, does not furnish a wiser maxim than that which is contained in the short precept *stare decisis*'." 1 Bligh, 24.

Two striking instances in which it was followed may be given: In the case of Candee v. Lord, 2 New York 269, in which the actual decision of the original Court of Appeals simply dismissed an appeal from an order of the chancellor, Judge Gardiner, who wrote the opinion, argued elaborately in favor of the proposition that "a judgment obtained without fraud or collusion is conclusive evidence, in suits between creditors in relation to the property of the debtor, of the indebtedness of the latter and the amount of the indebtedness." The syllabus in the report gives this quotation as an abstract of the decision. Subsequently the proposition was attacked in Nicholas v. Lord, 193 New York, 388.[1] In the opinion, Vann, J., said, referring to the case of Candee v. Lord (page 394):

"If that case stood alone we might not feel at liberty to depart from the rule that a judgment recovered against a grantor years after he parted with all his title, is not binding upon the grantee, who was neither a party nor privy thereto; but it does not stand alone. For nearly sixty years it has been treated by the courts as establishing the law as stated in the head note. It has been cited repeatedly by this court as authority for what Judge Gardiner wrote and Judge Comstock reported." (Citing nine cases) and further on page 396:

"Thus the opinion of Judge Gardiner, even if it did not express the law when it was written, has now become the law by adoption and we cannot announce a different rule, for the question is not an open one."

As another example see Taylor v. Young, 71 Pa. 81, reaffirming the practice upon two returns of *nihil habet* in ac-

[1] The writer is indebted to L. H. Beers, Esq., of counsel for the appellant, for a reference to this case.

tions of *scire facias sur* mortgage. How much clearer the procedure was under this case than under section 10 of the Service Act (Pa.) of July 9, 1901, (P. L. 614) with its requirements of the affidavit as to the real owner of the land charged and specifications for service, going so far now that there is a contention that a *fi. fa.* and *vend. ex.*, issued upon a judgment confessed on a bond accompanying a mortgage, are within the purview of that tenth section. This would be an instance of judicial legislation, a *sci. fa.* being the writ to begin an action and a *D. S. B.* being final and definite, unless opened, stricken off, or vacated.

It cannot be maintained, however, that an erroneous decision should not be reversed simply because it has been made. Broom's Legal Maxims, *152, gives this extract from Bacon's Essay "Of Innovations:" "A froward retention of custom is as turbulent a thing as an innovation; and they that reverence too much old times are but a scorn to the new."

The only averment here is that the common law may and does cover a wide field without statutory assistance.

A decision based upon principles of law is reached after full discussion by counsel in the lower and higher courts and after the members of the court of appellate jurisdiction, having heard argument, have consulted with each other. On the other hand, it is rare that proposed enactments can be threshed out point by point with the same thought and ardor as are cases actually in court. Further, the remarks of F. Vaughn Hawkins, Esq., (Thayer's Preliminary Treatise on Evidence, App. C. p. 585) on principles of legal interpretation of wills, are pertinent to the drafting of statutes.

"The failure of language adequately to convey the intention may take place from three causes: first, the imperfection of language in itself, considered as a code of signals, its want of definite signification, and its inadequacy to the expression of every phase of thought; secondly, from the improper and unskilful use of language by the writer; thirdly, from the limited nature of the human mind, incapable of foreseeing all contingencies to which the expression of its intent may require to be adapted, especially if the interpretation of the writing takes place at a period long after that at which it was composed."

Add either of these two hypotheses: If a proposed enactment is meant to be *declarative* of existing law, then there is the difficulty of diversity of opinion on the question of what such existing law is; or, if meant to be *constructive,* then the question arises what is a just and accurate rule to provide for the contingencies for which new provision is sought?

A further objection is the delay in getting a final decisive interpretation of an act. A notable example is found in a single point of practice under the Statement Act (Pa.) of May 25, 1887, (P. L. 271) whether service of a copy of a statement made prior to the service of the summons in an action of assumpsit is sufficient to entitle plaintiff to judgment against the defendant for want of an affidavit of defense. See Commonwealth v. Bangs, 22 Pa. Super. Ct. 403 (1903); Gorman v. Hibernian B. & L. Assn., 154 Pa. 133 (1893); Loeb v. Allen, 32 Pa. Super. Ct. 137 (1906).

Again there is the danger of attempting constructive legislation by those who are purely theorists. The result may be reputation for the writer, for writers are said to make the law. In fact it comes in chunks, but academic, inapt, confused and confusing to those who have to be governed by it, who indeed are too often not only "at sea" but "in deep water"—*Rari nantes in gurgite vasto.*

The statement of Judge Gibson in Shacklett's Appeal, 14 Pa. 326 in deciding that foreign attachment executed upon real estate should bind the same against judgment creditors, when the statute named only purchasers and mortgagees, upon the ground that a judgment creditor, though not within the letter, is within the equity of the enactment, should be considered by those who are trying to make codes. He said: "The clause, however, is but another proof that every codification of the law must necessarily be lame and imperfect, though executed by the ablest hand."

Reference is also made to the sentences of Mr. Justice Dean, in Waters v. Wolf, 162 Pa. 153 (see page 167), concluding with the terse expression "Laws seem to be born full grown about as often as men are." How weighty, in view of these difficulties, are the words of Lord Bowen after the decision in the great case

of the Mogul S. S. Co. v. McGregor, 23 Q. B. D. 612, given by Mr. Bigelow in a note on page 7 of his book on Bills, Notes and Checks: "Law should follow business."

In view of the unsettling effect of new legislation and apart, moreover, from forensic contentions, it is a truism that a large part of the duty of a lawyer in actual practice is consultation, the advisory guidance of clients in advance of their engagements in business or their entrance upon some line of conduct. Advice must be as diverse as the purposes and plans of those who seek it. It is responsible and should be reasonably accurate. A referee or a master or a judge decides upon the validity of things already done, of conditions that are fixed; advocates argue questions based on shown facts; in matters of advice prior to action there is need of safety, of repose. Those who have not the experience of trying to help clients, who rely upon their protective counsel for direction in matters of vital importance before action, cannot feel with the same sensitiveness the risk of altering laws as can one who as a pilot dreads the changes of the course. He craves certainty, not guesswork.

As a concrete specimen of a very careful endeavor to codify, let us glance at the Negotiable Instrument Law, the fruit in England of the study of a learned digester of English cases, of a select committee of merchants, bankers and lawyers, of a committee of the House of Lords; and in America, of a sub-committee of the Commissioners on Uniform State Laws. It is submitted that it has adopted, in the many states in which it has been enacted, the English law, of which it was declarative, to no practical advantage and has led to confusion. The concluding word of the late Dean Ames, who was *facile princeps* among non-practitioners, is: "the writer retains his conviction that it is wiser to have no code at all than to adopt the Negotiable Instrument Law in its present form. If, on the other hand, the law should be amended as suggested in this paper, the sooner it is enacted throughout the Union the better." (See Brannen on N. I. L. p. 176.)

This suggests a further thought, that parts of codes after promulgation are often altered by subsequent amendment. To

illustrate: Section 137 [2] of the Act (Pa.) of May 16, 1901, reads as follows:

"Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such further period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same."

The Supreme Court in Wisner v. Bank, 220 Pa. 21 interpreted that section to mean that the failure or neglect of a drawee to whom a bill is delivered for acceptance to return the bill, accepted or non-accepted, to the holder within twenty-four hours after delivery makes the drawee an acceptor of the bill. And a check is a bill of exchange under section 185 of the act.

Thereupon an act (April 27, 1909, [Pa.] P. L. 260) was passed amending section 137 of the Act of 1901, as follows:

"Provided, That the mere retention of such a bill by the drawee, until its return has been demanded, will not amount to an acceptance; and provided further, That the provisions of this section shall not apply to checks."

thus striking out the provision as to checks, but leaving bills subject to section 137 with the modification that demand for a return has been made. Compare First National Bank of Northumberland v. McMichael, 106 Pa. 460, in regard to inference of acceptance from delay for the law prior to the Negotiable Instrument Act—as to checks.

A further illustration at hand, is this: The Mechanics' Lien Act (Pa.) of June 14, 1901,[3] (P. L. 431) and the amendment thereto by the Act (Pa.) of April 17, 1905 (P. L. 172) furnish exhibits of amendments which unsettle instead of settling. The eleventh section of the original act contained eleven averments to be made in the claim filed. The amendment gives three. Further, an affidavit by the sub-contractor was required in the original eleventh section. This was omitted in the amendment. On the other hand, the eighth section of the original act, which

[2] Grateful acknowledgment is made to Professor Crawford D. Hening for the 137th sec. and the citations.

[3] This act has been fully discussed elsewhere and so is briefly cited.

was construed by the Supreme Court in McVey v. Hoffman, (223 Pa. 125) to be a condition precedent to the right of a sub-contractor to file a lien has not been repealed. Must such affidavit of the written notice by the sub-contractor be now set forth in the claim filed? (See Bametzrieder v. Canevin, 44 Pa. Super. Ct. 18.)

Again, the 32nd section of the original act provided for a form of *sci. fa.*, with a notice to file an affidavit of defense within fifteen days. By the amendment, that section is repealed; does the 33rd section still stand which allowed service of a *sci. fa.* to be made at any time within three months from the date on which it is issued, whereas the form of the writ of *scire facias* given by the amendment specifically makes the writ returnable "on the first Monday of——next"?

In this entire article, illustrations ready at hand, necessarily, have been used, but many more might be found. These, however, are enough to exemplify these particular objections to codification. It is believed that the points herein barely mentioned apply as well to projects to make uniform laws in separate states of the Union. If it be argued that such uniformity is desirable and also that in the common law there has been a vast diversity and conflict of decisions by courts of different states, it may be said:

(1) That the purpose, the intent and the supposed benefit of uniform legislation for as many states as may enact a particular code are specifically to enforce certainty and avoid conflict; but, that they are liable to failure because of dissimilar interpretation of the same words by separate courts, words intended to be absolutely clear and definite in meaning by the producers and sponsors of the statutes; see for instance the opinion of Von Moschzisker, J., in Raken v. Henry, 16 Pa. Dist. Rep. 208, in which he considered some opposing decisions upon the right of one who takes a note of a third party merely as collateral for an antecedent or pre-existing debt without any new consideration passing at the time. Is such a person a holder for value or is he not?

(2) That individual communities have exigencies, customs and laws which ought not to be wantonly broken in upon for the

sake of non-residents—a large majority injured for the supposed good of a small minority.

(3) "It is the law that the relation of the various departments of a city government is one of agency defined by statute and that all persons who deal with them are bound to take notice of the measure of their authority and that every act or contract that exceeds it is invalid." Per Hare, P. J. in 17 W. N. C. 531. If, therefore, a non-resident in such a case who contracts with a municipality is subjected to local law, is it any greater hardship for a non-resident of a particular state to be bound by the laws of that state?

The suggestions of this article are not, cannot be, and are not intended to be exhaustive; nor do they lead to the conclusion that the legal maxim *"Omnis innovatio plus novitate perturbat quam utilitate prodest"* is to be literally and slavishly observed. For example, it may be hoped that there will be great benefit from the enactment of uniform state laws applying to social and industrial questions that affect the welfare of people in all parts of our country. Legislative action, however, should be based upon demonstrated need, careful study of the proposed remedy in substance, of its constitutionality, of the meaning of every word used in a proposed act, with a careful examination of existing decisions as well as statutes. Knowledge of law as well as of the English language is required and the pen of one who thinks he has a facility for legislative expression should indeed "make haste slowly." This caution should also be observed in accordance with the statement in Broom's Legal Maxims No. 150, "So, likewise with respect to matters which do not affect existing rights or properties to any great degree, but tend principally to influence the future transactions of mankind, it is generally more important that the rule of law should be settled than that it should be theoretically correct."

John W. Patton.

Law School,
University of Pennsylvania.